

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
24.174.401 fee schedule)

TO: All Concerned Persons

1. On December 20, 2007, the Board of Pharmacy (board) published MAR Notice No. 24-174-57 regarding the amendment of the above-stated rule, at page 2051 of the 2007 Montana Administrative Register, issue no. 24.

2. On January 14, 2008, a public hearing was held on the proposed amendment of the above-stated rule in Helena. Several comments were received by the January 22, 2008, deadline.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: Two commenters appeared together and objected to increasing the renewal fee for in-state pharmacies by \$50 while increasing the out-of-state mail service pharmacy renewal by \$200. The commenters stated that the proposed fees are disproportionate, unjustified, and in violation of the Commerce Clause to the United States Constitution, and that unequal fees could jeopardize mail service pharmacy delivery to rural patients. The commenters also stated that complaints concerning an out-of-state mail service pharmacy can be addressed by the board in the state where the pharmacy is physically located.

RESPONSE 1: The board notes that Montana's fees have historically been disproportionately low compared to other states and of the 256 licensees affected by this change, only one objection was received. Montana has not required on site inspections of out-of-state mail service pharmacies, only those pharmacies located in this state. However, with an adequate staff and budget, the board anticipates performing inspections on out-of-state mail service pharmacies as well, which would incur much greater costs compared to in-state pharmacies. Further, the board concluded that Montana cannot rely on other states to police Montana licensees located within their jurisdictions and the board must proactively anticipate additional costs involved in the ongoing regulation of out-of-state pharmacies. The board concluded that the difference in renewal fees is not a barrier to interstate commerce and is amending the rule exactly as proposed.

COMMENT 2: One individual supported the proposed fee increase to fund the full-time executive director and pharmacy inspector positions at salaries in line with neighboring states. The commenter noted that in-state pharmacies and their employees also pay Montana state income taxes but out-of-state pharmacies do not.

The commenter further stated that in-state pharmacies are at a competitive disadvantage versus mail service pharmacies as mail service pharmacies purchase inventory at approximately 17 percent less than the average retail pharmacy. The commenter suggested staggered licensure fees based on the number of prescriptions filled in a year to benefit rural and smaller volume pharmacies.

RESPONSE 2: The board notes that tax considerations and competitive advantage/disadvantage for respective licensees are issues beyond the board's purview and jurisdiction. The board concluded that aligning multiple licensure fees to prescriptions sold would be an unreasonable administrative burden and beyond the board's statutory authority.

4. The board has amended ARM 24.174.401 exactly as proposed.

BOARD OF PHARMACY
JAMES CLOUD, CPhT, PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State March 31, 2008